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ADMITTED IN D.C. AND VA

January 26, 1998

OUR FILE NO.
1548-101-63

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Implementation of Section 309(j)
of the Communications Act
MM Docket No. 97-234

Dear Ms. Salas:

On behalf of Grace Communications L.C. are an original and four copies of the Comments in the above-referenced proceeding.

If there are any questions, please contact the undersigned.

Sincerely,

John M. Pelkey

JMP/ned

Enclosures: (5)

cc: Mass Media Bureau, FCC
Audio Services Division, FCC
Office of General Counsel, FCC

Before The

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264

To: The Commission

Comments of Grace Communications L.C.

Grace Communications L.C. ("Grace"), through counsel, hereby provides its Comments in response to the *Notice of Proposed Rulemaking* ("*Notice*") issued by the Commission in the above-captioned proceeding. In that Rulemaking, the Commission proposes to adopt the use of auctions to resolve mutually-exclusive applications for initial construction permits for broadcast stations. Through these Comments Grace seeks to remind the Commission that, in implementing the authority granted to it by Congress for the use of competitive bidding

systems to award broadcast licenses, the Commission must not lose sight of the equitable considerations that must be taken into account (1) if the Commission is to avoid foreclosing broadcast opportunities to the many broadcasters in waiting who have formed the backbone of this country's broadcast industry and (2) if undue concentration of broadcast media is to be avoided.

Specifically, Grace urges the Commission to adopt the use of a truncated comparative hearing for pending applications for new broadcast stations wherein the Commission would resolve such applications through the use of a diversification standard. Grace further suggests that the Commission not re-open already closed windows but establish a period of 120 days wherein post July 1 applicants can seek to resolve their mutually-exclusive status without regard to the current limitation whereby dismissing applicants may receive no more than their reasonable and prudent expenses. Finally, Grace urges the Commission, if it decides that it must award initial licenses through the use of auctions, to provide bidding preferences for those applicants without other broadcast stations and to award any preferences for minority or female status to the extent of such minority or female ownership of an applicant and not merely on the basis of whether an applicant is "controlled" by minorities or females.

I. Identity of Grace Communications L.C.

Grace is a limited liability company established under Virginia law. Its principals are Rick and Teresa Lambert, a husband and wife who live in Cape Girardeau, Missouri. Mr. Lambert has been involved for many years in the managing of radio stations in smaller markets in Missouri and Kentucky. As is true with any manager who cares about his business, one of Mr. Lambert's aspirations has been to own a radio station.

Toward that end, Mr. Lambert formed Grace in January, 1997. In that same month, Grace filed a Petition for Rulemaking seeking the allotment of a new FM channel to Shawsville, Virginia as that community's first commercial FM channel. The Commission issued a *Notice of Proposed Rulemaking* ("Shawsville NPRM") asking for comments with respect to Grace's proposal on March 28, 1997. 12 FCC Rcd 3680 (1997). Shawsville NPRM established May 19, 1997 as the comment date. Only Grace filed comments with respect to the proposal. Unfortunately, however, the *Report and Order* in the Shawsville proceeding was not issued until August 8, 1997. 12 FCC Rcd 11624 (1997). This means that, through no fault of its own, Grace was foreclosed from filing an application prior to July 1, 1997.

Grace thus finds itself the victim of governmental sandbagging. Grace initiated its efforts with the Commission to establish a new station

at Shawsville, Virginia, in January, 1997, i.e., more than six months before the passage of the Balanced Budget Act of 1997. It filed its Comments in support of its proposal in May, 1997, i.e., some ten weeks before the passage of the Balanced Budget Act. Because its January 1997 proposal was not adopted until August 8, however, it simply could not file an application for Shawsville prior to July 1. Nevertheless, the Commission's proposed rules would establish July 1, 1997 as the line of demarcation between those applications that might still be subject to comparative hearing, and those that will not. That date is also the dividing line between those applications that can be freely settled and those that can only be settled if the Commission's restrictions on settlements for a profit are observed. Moreover, the Commission holds out the possibility that applications filed after July 1, 1997 might be subject to yet further competing applications. This distinction in treatment is, however, not only manifestly unfair, it is also unnecessary inasmuch as, contrary to the implication of the Commission's *Notice*, the legislation does not compel such a distinction.

II. The Commission Should Adopt the Use of a Modified Comparative Hearing to Decide Among Mutually-Exclusive Applicants Whose Applications are Filed Prior to the Adoption of the *Report and Order* in This Proceeding.

The Balanced Budget Act provides the Commission with authority to resolve mutually-exclusive applications for initial

construction permits through the use of a competitive bidding system. 47 U.S.C. § 309(j). The requirements of such a "system" are described in only the sketchiest of terms. Indeed, the statute prescribes that the Commission is to design and test multiple alternative methodologies. 47 U.S.C. § 309(j)(3). It thus would appear that the Commission has been given broad authority to prescribe the competitive bidding system to be used by it. One such "system" could be to draw a distinction between applications filed before the effective date of the *Report and Order* in this rulemaking and those that are filed after the effective date of the *Report and Order* in this rulemaking. That mechanism certainly would be the fairest, especially given the fact that, with respect to FM stations, the process leading to the creation of initial facilities would have begun, in virtually every case, before July 1, 1997.

Although the *Bechtel*[1] decision struck down the use of the integration criterion, it did not call into question the diversification criterion that has formed the backbone of the Commission's attempts to avoid an undue concentration of media control. There is no need to abandon the Commission's attempt to ensure that broadcast authorizations are held by the largest number of people possible. The goal is a valid one. To ensure that this goal is met, the Commission should adopt the use of a limited comparative hearing wherein the

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[1] *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

applicants are compared on the basis of their ownership of other broadcast facilities. Ownership of broadcast facilities in the market in question would be accorded the greatest diversification demerit whereas ownership of broadcast facilities in other markets would result in a lesser demerit.

III. Assuming that the Commission Decides to Use Auctions to Award Those Construction Permits for Which Mutually-Exclusive Applications were Filed After July 1, it Should Adopt Rules that Would Help Prevent Inflaming an Already Unfair Situation.

The Commission should not open up the already-closed windows to new applications. Parties who had any interest whatsoever in applying for communities such as Shawsville, (i.e., communities for which the relevant windows have already closed) had an ample opportunity to demonstrate that interest by filing a timely application. At this point, reopening those windows would do nothing more than open up those facilities to speculators. Moreover, reopening such windows would be fundamentally unfair. It is bad enough that the Commission currently penalizes applicants, such as Grace, who expended the time, effort and money to determine the availability of channels that could be allocated to new communities only to have that time, effort and money go for naught by permitting all comers to file applications for such

communities. Reopening such windows at this time would only further jeopardize such an applicant's endeavors.

Moreover, reopening already closed windows is not mandated by the Balanced Budget Act. While it is true that Congress directs that windows are not to be reopened with respect to applications filed before July 1, it did so only as a form of limitation on the power of the Commission. Nowhere in the statute does it prescribe that applications filed after July 1, 1997 are to be subject to further competing applications.

Similarly, in prescribing that the Commission is to waive its rules so as to permit applications filed before July 1, 1997 to be settled without regard to the limitations imposed by the Commission on settlements whereby dismissing applicants would receive more than their reasonable and prudent expenses, Congress did not prohibit the Commission from permitting all pending applications to be settled without regard to such limitations. In fact, the authority granted to the Commission to use a system of competitive bidding specifically provides that such authority is to be used only if it is "consistent with the obligations described in paragraph (6)(E)". 47 U.S.C. § 309(j)(1). One of the obligations so imposed upon the Commission is to determine whether mutual exclusivity cannot be eliminated through the use of negotiation. So important was the use of negotiation and other means to eliminate

mutual exclusivity that the Conference Report specifically reminds the Commission that it must not, in its rush to implement a competitive bidding system, overlook "negotiations . . . or other tools that avoid mutual exclusivity." 1997 (No. 7) U.S.C.C.A.N. 176, 192. This being the case, it would appear that granting the post-July 1 applicants an opportunity to resolve the mutually-exclusive status of their applications for some set period of time, such as 120 days, would be more consistent with the Congressional intent than simply forcing those applicants to an auction.

Furthermore, in devising its rules for an auction, it is important that the Commission not lose sight of the fact that it must perform a role other than revenue collector for the Federal Treasury. In particular, it must not lose sight of the fact that the diversification of ownership of media remains an important goal. In this regard, Grace urges the use of bidding preferences that would recognize the importance of such diversification. In particular, Grace would suggest that any bidding credit for diversification be equivalent to the credit awarded for minority status or small businesses.

Similarly, Grace also suggests that, in awarding credits for minority or female status, the Commission should not limit such credit to those entities that are "owned" by minorities or females. In the past, the Commission awarded credit to applicants on the basis of the

percentage of minority or female ownership. An advantage of that scheme was that it encouraged minorities and females to become participants in broadcast entities even if the financial wherewithal to own a controlling interest was absent. The Commission should encourage minority and female ownership even if that ownership does not raise to the level of control. To focus entirely on the issue of control would be a mistake inasmuch as it could well lead to the trivialization of any minority or female ownership interests that do not constitute controlling interests.

IV. Conclusion

For the reasons stated above, Grace encourages the Commission to (1) use a modified form of comparative hearing to decide among competing mutually-exclusive applicants; (2) not reopen windows that have already closed; (3) waive the Commission's rules so as to permit settlements among post-July 1 applicants even if those settlements would result in non-prevailing applicants receiving more than their reasonable and prudent costs; and, if the Commission opts to resolve post-July competing applications through an auction: (4) award bidding credits to entities that do not have other broadcast interests; and (5) award bidding credits for minority and female ownership interests in applicants even if those interests do not rise to the level of control. By adopting these suggestions, the Commission will be furthering its long-

standing goal of ensuring diversification in the broadcast industry while minimizing the draconian effects of the Commission's proposed implementation of the Balanced Budget Act.

Respectfully submitted,

Grace Communications L.C.

By: _____
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Date: January 26, 1998

CERTIFICATE OF SERVICE

The undersigned, an employee of Haley Bader & Potts P.L.C., hereby certifies that the foregoing document entitled "Comments of Grace Communications L.C." was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered, to the following:

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Date: January 26, 1998